No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

IMEE MARCOS-MANOTOC,
Petitioner,

v.

AGAPITA TRAJANO,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1391(f), 1602-1611, is the exclusive jurisdictional basis for suits against officials of foreign governments brought in the courts of the United States?

2. Whether the Alien Tort Statute of 1789, 28 U.S.C. § 1350, which empowers district courts to hear "civil actions by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States," applies extraterritorially and encompasses claims by foreign national plaintiffs against foreign government officials arising out of acts occurring entirely within the territory of a foreign sovereign?

3. Whether actions taken by officials of a foreign government within a foreign nation are torts committed "in violation of the law of nations" as that phrase is used in the Alien Tort Statute?

4. Whether in enacting the Alien Tort Statute, the First Congress authorized the courts of the United States to apply the civil codes of foreign nations to award money damages in suits brought under the statute?

5. Whether, so construed, the Alien Tort Statute exceeds the scope of Article III of the Constitution?

STATEMENT PURSUANT TO RULE 14(b)

The caption contains the names of all parties to the case who were parties in the court of appeals.

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OPINIONS BELOW

The opinion of the court of appeals (Appendix, pp. 1a-19a) is reported at 978 F.2d 493. The judgment and order of the district court (Appendix, pp. 20a-27a) is unreported.

JURISDICTION AND PARTIES

The judgment of the court of appeals was entered on October 21, 1992. A timely petition for rehearing and suggestion of rehearing *en banc* was denied on December 29, 1992. (Appendix, p. 28a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The parties in the court of appeals and in this Court are petitioner and respondent, in her own behalf and as personal representative of her son. The late Ferdinand E. Marcos was a party in the district court.

28 U.S.C. § 2403(a) may be applicable in that the question of the constitutionality of an Act of Congress, the Alien Tort Statute, 28 U.S.C. § 1350, was decided by the court of appeals and is drawn in question by this petition for a writ of certiorari.

The court of appeals did not certify to the Attorney General that the constitutionality of an Act of Congress had been drawn into question. However, at the request of the court of appeals, the United States had submitted a brief as *amicus curiae* at an earlier stage of this litigation. The court below stated it had considered the submission of the United States in deciding this case. App. p. 2a, n.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article III, sec. 2, cl. 1 of the Constitution provides:

> The judicial Power shall extend to all Cases, in Law and Equity arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority; . . . .

2. The Foreign Sovereign Immunities Act provides in relevant part:

> § *1330(a)* The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under §§ 1605-1607 of this title or under any applicable international agreement.
>
> § *1603(a)*: A 'foreign state' . . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An 'agency or instrumentality of a foreign state' means an entity—
>
> > (1) which is a separate legal person, corporate or otherwise, ...

§ *1604* Subject to existing international agreements to which the United States is a party at the time of enactment of this Act, a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in § 1605-1607 of this chapter.

§ *1605(a)* A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment.

3. Section 9 of the Judiciary Act of 1789, 1 Stat. 73, 78 provided:

And Be It Further Enacted, that the district court shall have . . . cognizance, concurrent with the courts of the several States, or the circuit courts as the case may be, of all cases where an alien sues for a tort only, committed in violation of the law of nations or a treaty of the United States.

4. 28 U.S.C. § 1350 currently provides:

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

STATEMENT OF THE CASE

Petitioner, Imee Marcos-Manotoc, is the daughter of the late Ferdinand E. Marcos, former President of the Republic of the Philippines. She was National Chairman of the Philippine Kabataang Baranggay. App. p. 3a. When President Marcos came to the United States in 1986, Mrs. Manotoc accompanied her father. *Id.*

Shortly after the Marcos family arrived in Hawaii numerous plaintiffs, including respondent, filed suit against President Marcos and Mrs. Manotoc under the Alien Tort Statute.

Respondent's complaint asserted that she was a Filipino who resided with her family in Manila. Respondent alleged that one of her children, Archimedes, resided with her while attending a public university in Manila. According to the complaint, Archimedes was kidnapped and murdered by Philippine military intelligence personnel acting under the authority and control of President Marcos and Mrs. Manotoc. (App. pp. 29a-34a).

The district court (Fong, J.) dismissed all of the complaints, including respondent's, on the ground the defendants were immune from suit under the Act of State doctrine.

On appeal, the Ninth Circuit invited the United States to express its view on the questions of whether subject matter jurisdiction was present, whether a private federal cause of action for damages existed, and the applicability of the Act of State doctrine.[1] In response to the court's request, the United States submitted an *amicus curiae* brief contending that the district court correctly dismissed respondent's complaint for two independent

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[1] The court's order requested the United States to address the following issues: "(1) Do allegations of wrongful death, wrongful arrest, or torture committed by a foreign governmental official against a foreign national in a foreign nation plead a cause of action cognizable in a United States district court under 28 U.S.C. § 1350? (2) May federal courts hear these consolidated cases, despite the 'Act of State' doctrine, either because wrongful death, wrongful arrest, or torture cannot be 'acts of state' as a matter of law, or because the 'balance of relevant considerations' favors a hearing? (3) Should the federal courts abstain from hearing these cases because of potential embarrassment to the United States?" *Trajano v. Marcos*, No. 86-2488, et al., Order filed July 16, 1987.

reasons: the Alien Tort Statute did not give American federal courts subject matter jurisdiction over a suit by an alien against a foreign government official because of acts occurring in a foreign country and, in any event, no federal statute created a private cause of action for money damages in such circumstances. In light of these conclusions, the United States suggested, it was unnecessary for the court to reach the question whether the immunity conferred by the Act of State doctrine barred respondent's action. (*Trajano v. Marcos*, No. 86-2448, et al., Brief for the United States as *Amicus Curiae*, filed October 29, 1987.)

Having requested the advice of the Executive Branch, the court ignored it. Instead, the court entered a terse memorandum reversing the district court's holding that Act of State immunity was applicable and declining to decide any other issue. *Trajano v. Marcos*, 878 F.2d 1439 (9th Cir. 1989) (table case).

Following remand, the Judicial Panel on Multidistrict Litigation ordered the complaints against President Marcos and petitioner then pending consolidated in the District of Hawaii. Judge Manuel E. Real of the Central District of California was designated to preside over the consolidated cases.

The litigation against the estate of the late President Marcos is still ongoing. Respondent contended, however, that Mrs. Manotoc was in default and that a separate judgment should be entered against her. On March 25, 1991, the district court entered a default. Following a short hearing, the court summarily entered a judgment for respondent for more than $4,000,000 in actual and punitive damages pursuant to various provisions of the *Philippine* Civil Code. (App. pp. 22a-23a.) No explanation for this ruling was offered.

At respondent's request, the district court severed petitioner's case from the ongoing litigation involving her

late father and entered a final judgment pursuant to Rule 54(b), F.R.Civ.P. (App. pp. 26a-27a.)

On appeal, Mrs. Manotoc contended that respondent's suit for money damages was precluded by the FSIA; that the Alien Tort Statute did not apply extraterritorially and did not encompass a claim by an alien plaintiff against officials of her own government because of actions purportedly occurring within the jurisdiction of a foreign sovereign; that respondent had no private cause of action arising or cognizable under federal law; and that the construction of the Alien Tort Statute proposed by the district court would render the statute unconstitutional. The Ninth Circuit rejected petitioner's submission and affirmed the judgment of the district court.

The court of appeals dismissed petitioner's contention that the Alien Tort Statute did not apply extraterritorially, saying that the statute contains "no limitations as to the citizenship of the defendant, or the locus of the injury" and Congress did not expressly "*prohibit*" extraterritorial application of the statute. (App. pp. 11a-13a.) (emphasis in original). The many decisions of this Court holding that, under such circumstances, a statute is to be construed pursuant to a presumption *against* extraterritorial application went unmentioned.

The court was confident that the phrase "law of nations" in the statute encompassed acts of mistreatment by foreign government officials even when the acts were committed within the territory of a foreign sovereign and involved only citizens of that sovereign. This view was, the court believed, consistent with evolving notions of "customary international law" as they are understood today. (App. pp. 10a-11a.) The relevance of evolving norms of customary international law to a statute enacted two centuries ago was not explained.[2]

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[2] The reasoning of the court below on this point echoes almost word for word the view of Second Circuit regarding "evolving"

The court passed silently over petitioner's submission that the language of the Alien Tort Statute—a tort committed in violation of "the law of nations or a treaty *of the United States*"—refers to a tort committed within the United States and which would be subject to the law of the United States.

After endorsing worldwide jurisdiction under the Alien Tort Statute, the court of appeals tersely affirmed the unexplained holding of the district judge that the Philippine Civil Code should be applied to determine the legal rights of the parties to this case. Under this approach, in the view of the court, a plaintiff's "cause of action comes from [the] municipal tort law" of a foreign sovereign, while the allegation that a violation of international law has occurred "supplies the jurisdictional key to federal court." (App. pp. 18a-19a.) The court did not suggest that the First Congress enacted this novel regime in 1789.

The court perceived no constitutional infirmity to its construction of the Alien Tort Statute. The stated reason was that petitioner had claimed FSIA immunity and "when questions of sovereign immunity under the FSIA are raised" subject matter jurisdiction exists under the authority of *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983).

Verlinden held that the *FSIA* was a permissible exercise of Congress' power to enact legislation pursuant to the "arising under" clause of Article III. The court below, however, read *Verlinden* as authority for its construction of the Alien Tort Statute because "[o]nly individuals who acted under official authority or under color of such authority" are potential defendants and litigation against such defendants "necessarily implicates sovereign immunity." (App. pp. 15a-16a.) Accordingly,

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principles of extraterritorial law in *Argentine Republic v. Amerada-Hess Shipping Co. Compare*, App. pp. 10a-11a, *with* 830 F.2d 421, 426-26 (2d Cir. 1988), *reversed*, 488 U.S. 428 (1989).

"subject-matter jurisdiction over this action satisfies Article III." *Id.*, at 16a.

The court, having employed the existence of a claim of FSIA immunity to sustain jurisdiction under an entirely different statute, also rejected petitioner's claim of immunity under FSIA. As noted, the court acknowledged that "only individuals who have acted under official authority or under color of such authority may violate international law." Nevertheless, the court held that FSIA did not prevent respondents from obtaining a money judgment against Mrs. Manotoc, *Argentine Republic v. Amerada-Hess Shipping Corporation*, 488 U.S. 428 (1989) notwithstanding. No explanation for this result (beyond the seemingly irrelevant observation that Mrs. Manotoc had defaulted and, therefore, admitted she controlled the Philippine Military Intelligence Agency) was offered. (App. p. 16a.)

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS HAS DECIDED IMPORTANT FEDERAL QUESTIONS IN DISREGARD OF A GOVERNING ACT OF CONGRESS, AND IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT ON THE SAME MATTER.

This case presents important and far-reaching questions regarding the scope of the FSIA and the Alien Tort Statute. The court of appeals held in this case that the courts of the United States are open to tort suits by aliens (but not United States citizens) who seek damages for torts allegedly committed by officials of foreign governments even though the conduct in question occurred entirely within the territory of a foreign sovereign. These holdings are inconsistent with FSIA and controlling decisions of this Court.

A. The Holding Below Directly Conflicts With This Court's Interpretation of FSIA.

This case presents the same question the Court decided in *Argentine Republic v. Amerada-Hess Shipping Cor-*

poration, 488 U.S. 428 (1989): Whether a suit against a foreign government, or an official of a foreign government, may be maintained under the Alien Tort Statute notwithstanding FSIA? In *Amerada-Hess*, this Court emphatically answered that question in the negative. The court below, while acknowledging that "only individuals who have acted under official authority" of a foreign sovereign are potential defendants under its construction of the Alien Tort Statute, nevertheless held that FSIA was not controlling because of Mrs. Manotoc's default. (App. pp. 11a, 16a.) This reflects an astonishing misunderstanding of the structure and purpose of both FSIA and *Amerada-Hess*.

Mrs. Manotoc's default could not give the district court jurisdiction it never possessed. The default had the effect of admitting the factual allegations in respondent's complaint. Those allegations, however, simply confirm that FSIA applies since Mrs. Manotoc was sued because of her purported control over an "agency or instrumentality" of a foreign sovereign—the military intelligence personnel of the Republic of the Philippines. Mrs. Manotoc's default did not and could not alter the Court's holding in *Amerada-Hess* that "[t]he FSIA provides the sole basis for obtaining jurisdiction over a [defendant covered by the Act] in the courts of this country." 488 U.S. at 443. *See Ohio Cent. R. Co. v. Central Trust Co.*, 133 U.S. 83 (1890):

> Although the defendant [in default] may not be allowed, on appeal, to question the want of testimony or the insufficiency or amount of the evidence, he is not precluded from contesting the sufficiency of the [complaint], *or from insisting that the averments contained in it do not justify the decree.*

Id., at 91 (emphasis supplied). In this case, the "averments contained in" respondent's complaint demonstrate that FSIA is the sole basis for jurisdiction by an American court.

The refusal of the court below to accept the controlling force of *Amerada-Hess* may be explained by the court's distaste for the allegations against petitioner. *See*, App. p. 14a. ("One hopes that the universe of potential defendants [against whom such allegations may be made] is not that large"). But the nature of the tort alleged cannot alter the applicability of FSIA. In this connection, it may be noted that the conduct at issue in *Amerada-Hess*—the use of air power to destroy an unarmed merchant vessel on the high seas—is universally denounced by civilized nations. Indeed, it was the record of world-wide condemnation of such action upon which the Second Circuit relied in finding that Argentina's conduct violated the "law of nations." The whole point of *Amerada-Hess* is that American courts lack jurisdiction over all "cases involving alleged violations of international law that do not come within one of the FSIA's exceptions." 488 U.S. at 438. In this case, as in *Amerada-Hess*, there is no such exception. The contrary holding of the court below should be reviewed and corrected.

B. The Holding Below That Federal Legislation Applies Extraterritorially Is in Conflict With Controlling Decisions of This Court.

The court below held that the Alien Tort Statute applies to a tort committed in violation of the "law of nations" anywhere in the world by any foreign government official upon any alien. (But not, ironically, upon United States citizens.) The court reached this extraordinary result because Congress had not gone so far as to "*prohibit* the United States from providing a forum for claims by aliens . . . occurring elsewhere." (App. p. 12a.) (emphasis in original). Thus, since the Alien Tort Statute "on its face" contains "no limitation as to the citizenship of the defendant, or the locus of the injury," (App. p. 13a), it creates *worldwide* subject matter jurisdiction in the district courts. In the instant case, this

all-encompassing jurisdiction was held to embrace an act by a Philippine government official against a Filipino within the territory of the Philippines. *Id.*

This holding—that federal legislation applies extraterritorially unless Congress affirmatively declares that it shall not—is in open and irreconcilable conflict with controlling decisions of this Court. Already this Term the Court has reiterated that

> [i]t is a long-standing principle of American law 'that legislation of Congress, unless a contrary intent appears,' is meant to apply only within the territorial jurisdiction of the United States.

Smith v. United States, No. 91-1538, —— U.S. ——, —— (1993), *quoting*, *Equal Employment Opportunity Commission v. Arabian American Oil Co.*, 499 U.S. ——, —— (1991).

In a factual context identical to that presented by this case—an assertion of jurisdiction under the Alien Tort Statute and a claim of immunity under FSIA—the *Amerada-Hess* Court invoked the presumption *against* extraterritorial application of federal legislation and refused to apply either statute extraterritorially. More recently, in *Arabian American Oil*, the Court rebuffed extraterritorial application of an important federal civil rights statute in the absence of a clear statement from Congress that extraterritoriality was intended, even though the litigants were American citizens.

The conflict between the holding below and the controlling decisions of this Court is complete. While this Court has repeatedly held that there is a "presumption against extraterritorial application of United States statutes" (*Smith*, *supra*, —— U.S. ——, *quoting*, *Amerada-Hess*, *supra*, 488 U.S. at 436) which can be overcome only by an "affirmative showing" of a "clear statement" from Congress (*Arabian American Oil*, *supra*, 490 U.S. ——, ——), the holding announced below is the exact reverse: federal legislation applies extraterritorially unless Congress expressly forbids such an

interpretation. The far-reaching consequences of this holding are self-evident. It manifestly warrants this Court's review.

II. THE CONSTRUCTION GIVEN TO THE ALIEN TORT STATUTE BY THE COURT OF APPEALS PRESENTS AN IMPORTANT FEDERAL QUESTION WHICH SHOULD BE REVIEWED AND DECIDED BY THIS COURT.

The Alien Tort Statute grants the district courts jurisdiction to hear tort actions if the plaintiff is an alien and the tort is one committed "in violation of the law of nations or a treaty of the United States." The phrase "of the United States" is most reasonably read as modifying both the word "treaty" and the phrase "law of nations." Under this construction, the "law of nations" referred to in the statute means a principle of the law of nations which has been adopted as part of American law by Congress. The phrase would also include acts by an American citizen directed against an alien.

The reasons for adopting this construction of the Alien Tort Statute have previously been presented to the Court in the brief submitted by the United States as *amicus curiae* in support of petitioner in *Amerada-Hess*. *See*, *Argentine Republic v. Amerada-Hess Shipping Corporation*, No. 87-1372, October Term, 1987, Brief for the United States pp. 23-27 (filed June 30, 1988). The United States expressed similar views to the court of appeals on the previous appeal in this case. *See*, pp. 4-5 and n.1, *supra*. Petitioner believes the analysis contained in these submissions demonstrate the need for review of the judgment below.

III. THE COURT OF APPEALS IMPROPERLY CREATED A PRIVATE REMEDY FOR MONEY DAMAGES UNAUTHORIZED BY CONGRESS.

The court below recognized that, even under its construction of the Alien Tort Statute, the statute is jurisdictional only; it does not purport to create a private

cause of action. The court of appeals, however, affirmed the holding of the district court that provisions of the Philippine Civil Code were available for an award of actual and punitive damages to respondent.

The court of appeals described the regime which it created as one in which an allegation that there has been a violation of international law provides the "jurisdictional key" (App. p. 19a) to an American federal forum and the "municipal tort law" of a foreign nation then furnishes rights and remedies. *Id.*

This astonishing conclusion was supported by neither reason nor authority.[3] The existence of a cause of action under the laws of a foreign sovereign is simply irrelevant to the question whether Congress has enacted a statute providing aliens with a cause of action, cognizable in American federal courts, for torts committed by foreign government officials within a foreign nation.

Even if Congress could under Article III of the Constitution extend the "arising under" jurisdiction of the federal courts to a case that would be governed solely by the substantive law of a foreign sovereign, the First Congress most certainly did *not* create such an extraordinary system when it enacted the Alien Tort Statute in 1789. The court of appeals did not suggest otherwise.

The holding below can only be described as a usurpation of the legislative function. The extent to which the holding of the court of appeals intrudes upon the constitutional prerogative of Congress is well illustrated by the recent enactment of the Torture Victim Protection Act, Pub. L. 102-256, 106 Stat. 73 (1992) ("TVPA"). The new statute covers the same subject matter as respondent's suit: alleged torture by foreign

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[3] The court below suggested in a footnote that petitioner did not raise this issue on appeal. (App. p. 15a, n.15). In fact, Mrs. Manotoc's brief in the court below argued that the unexplained ruling of the district judge invoking Philippine law "was not only error, but error of constitutional magnitude." Opening Brief of Appellant, pp. 31-32 and n.17.

government officials occurring within foreign nations.[4] Yet, under TVPA, respondent would *not* have a cause of action cognizable in an American federal court. Such a suit would be precluded by Section 2(b) of the new Act. Section 2(b) provides:

> *Exhaustion of remedies.* A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

Compliance with an explicit statutory exhaustion requirement such as this is jurisdictional. Failure to plead (and, if necessary, prove compliance with it) deprives a federal court of the authority to hear the plaintiff's case. *See*, e.g. *Coit Independent Joint Venture v. Federal Savings and Loan Board*, 489 U.S. 561, 579 (1989) (statutory requirement of exhaustion is jurisdictional); *Weinberger v. Salfi*, 422 U.S. 749, 766 (1975) (same).

Moreover, in this case, the exhaustion requirement was the linchpin of enactment of the statute. Thus, Representative Yatron, author of the amendment, emphasized that its effect was to "ensure" that a potential plaintiff seeking to invoke the jurisdiction of a United

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[4] Section 2(a) of TVPA creates a private civil action for money damages against an individual who,

> under actual or apparent authority, or color of law, of any foreign nation—
>
> (1) Subjects an individual to torture or
>
> (2) Subjects an individual to extrajudicial killing.

Section 3 of the Act defines the extrajudicial killing as "a deliberate killing not authorized by a previous judgment pronounced by a regularly constituted court . . . [but] does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation." The statute defines "torture" to mean an act "directed against an individual in the offender's custody or physical control, by which severe pain or suffering . . . whether physical or mental, is intentionally inflicted on that individual . . . ."

States court "must have exhausted all legal remedies in the country where the alleged torture took place." 137 Cong.Rec. pp. 11244, 11245 (Nov. 25, 1991). The House Report accompanying the bill which became TVPA dwells on the importance of Section 2(b) in preventing American judicial "intrustion into cases more appropriately handled by courts where the alleged torture or killing occurred" (1992 *U.S. Code Congressional and Administrative News*, p. 87) as well as "encouraging the development of meaningful remedies in other countries." *Id.*, p. 88.

Thus, under TVPA respondent's failure to plead or otherwise suggest she has sought to invoke the jurisdiction of Philippine tribunals would end the matter. Indeed, the fact that the judgment in favor of respondent rests exclusively on provisions of the Philippine Civil Code *of itself* demonstrates that fully "adequate" remedies would be "available" to respondent in her homeland.

The effect of the holding in the court of appeals is to create, under the rubric of the Alien Tort Statute, the same remedy which Congress has now determined to enact in TVPA, *without* the important jurisdictional limitation which Congress stipulated must apply. A clearer example of judicial intrusion into the prerogatives of the Legislative Branch is difficult to imagine.

IV. THE CONSTRUCTION GIVEN THE ALIEN TORT STATUTE BY THE COURT OF APPEALS WOULD RENDER THE STATUTE UNCONSTITUTIONAL.

The statute now codified as 28 U.S.C. § 1350 was originally enacted as one of two jurisdictional grants pertaining to aliens contained in the Judiciary Act of 1789. Section 11 of the Act gave the circuit courts (the principal trial tribunals) jurisdiction of all civil disputes in which $500.00 or more was in controversy and "an alien is a party." Section 9 gave the district courts (tribunals of limited jurisdiction resembling present-day federal magistrate courts) concurrent jurisdiction where

an alien sues for a tort only, in violation of the law of nations or a treaty of the United States.

The First Congress did not explicitly state in either section that the jurisdictional grant was limited to suits in which an alien was suing an American citizen. However, with regard to Section 11, this Court rapidly, repeatedly, and unanimously held that the act could not be read to grant federal jurisdiction where, as here, both parties are aliens. Rather, the jurisdictional grant was necessarily limited to the extent permitted by Article III: Where "an alien is one party, but a citizen is the other." *Mossman v. Higginson*, 4 Dall. 12 (1800). Such a construction was necessary because "[t]he statute cannot extend the jurisdiction beyond the limits of the Constitution." *Hogdson v. Bowerbank*, 5 Cr. 302 (1809). *See also Jackson v. Twentyman*, 2 Pet. 136 (1829):

> "The eleventh section of the Act must be construed in conformity with the Constitution of the United States, and by the latter, the judicial power was not extended to private suits in which an alien is a party unless a citizen be the adverse party."

2 Pet. at 139.

Respondent argued below that these holdings were not controlling because Section 9 of the Act (the current 28 U.S.C. § 1350) should be deemed to have been enacted pursuant to the authority granted by the "arising under" clause of Article III rather than the Alien Diversity Clause. The court below apparently accepted this submission without comment.

The argument is extremely tenuous. There is no historical evidence to support the notion that the First Congress drew the distinction hypothesized by respondent. The improbability that the statute rested upon the "arising under" clause is heightened when it is recalled that the jurisdiction granted by Section 9 was *concurrent* with that of the state courts. By contrast, when Congress

finally granted federal question jurisdiction in 1875, it made that jurisdiction exclusively federal.

However, even if it is assumed that the Alien Tort Statute may be deemed to rest on the "arising under" clause, the constitutional infirmity remains. This Court has repeatedly held that a bare jurisdictional grant cannot, of itself, support "arising under" jurisdiction. *Verlinden B. V. v. Central Bank of Nigeria*, 461 U.S. 480, 496 (1983) ("A statute purporting to confer jurisdiction over actions 'where an alien is a party' would exceed the scope of Article III if construed to allow an action solely between two aliens"); *Mesa v. California*, 489 U.S. 121, 136-37 (1989) ("Pure jurisdictional statute . . . cannot independently support Article III 'arising under' jurisdiction").

The court below reached a contrary result on the theory that, by invoking FSIA immunity, petitioner *created* subject matter jurisdiction under this Court's holding in *Verlinden*. This is a grave misunderstanding of *Verlinden*. *Verlinden* held that *FSIA* was more than a pure jurisdictional statute and, therefore, that it was within the power of Congress to enact. But *Verlinden* did not suggest the bizarre notion that a foreign defendant's suggestion of immunity under FSIA infuses *other* enactments, such as the Alien Tort Statute, with a constitutionality they would otherwise lack.

The holding of the court of appeals turns an assertion of FSIA immunity into a trap. If the claim of immunity is not sustained, federal subject matter jurisdiction exists even though it would otherwise be lacking. Nothing in *Verlinden* suggests such a radical revision of the settled proposition that the lower federal courts have only such subject matter jurisdiction as Congress has given them.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE: ESTATE OF FERDINAND E. MARCOS
HUMAN RIGHTS LITIGATION

No. 91-15891

D.C. No. CV-86-207-MLR

AGAPITA TRAJANO; ARCHIMEDES TRAJANO,
Plaintiffs-Appellees,

v.

FERDINAND E. MARCOS,
Defendant,

and

IMEE MARCOS-MANOTOC,
Defendant-Appellant.

Appeal from the United States District Court
for the District of Hawaii
Manuel L. Real, District Judge, Presiding

Argued and Submitted
June 8, 1992—San Francisco, California

Filed October 21, 1992

Before: James R. Browning, Harry Pregerson and Pamela Ann Rymer, Circuit Judges.

Opinion by Judge Rymer

Bernard J. Rothbaum, Jr., Linn & Helms, Oklahoma City, Oklahoma (argued the case); Donald S. Smaltz, Smaltz & Anderson, Los Angeles, California (signed the briefs), for the defendant-appellant.

Jon M. Van Dyke, University of Hawaii School of Law; Sherry P. Broder, and Lillian Ramirez-Uy, Graulty, Ikeda & Ramirez-Uy, Honolulu, Hawaii, for the plaintiffs-appellees.

Ellen Lutz, Los Angeles, California, for amicus curiae Human Rights Watch.

Harold Hongju Koh, New Haven, Connecticut; Michael Ratner, New York, New York, for amici curiae Allard K. Lowenstein International Human Rights Clinic and the Center for Constitutional Rights.

OPINION

RYMER, Circuit Judge:

After former Philippine President Ferdinand Marcos and his daughter, Imee Marcos-Manotoc, fled to Hawaii in 1986, they were sued in federal court by Agapita Tajano, a citizen of the Philippines who then lived in Hawaii, for the torture and wrongful death of Trajano's son, Archimedes, in the Philippines on August 31, 1977.[1]

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[1] This appeal pertains only to the action against Marcos-Manotoc. Several amici appear in support of Trajano: the Allard K. Lowenstein International Human Rights Clinic, the Center for Constitutional Rights, and Human Rights Watch. The United States filed a brief as amicus curiae in connection with an earlier appeal from an order dismissing the action against Ferdinand Marcos on act of state grounds; the brief covers the issues raised in Marcos-Manotoc's appeal and we have considered it as well.

Marcos-Manotoc did not appear and a default judgment was entered against her. On appeal, she contends that the district court lacked subject-matter jurisdiction under the Alien Tort Statute, 28 U.S.C. § 1350, and that the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-11, does not authorize a federal court to assert jurisdiction, over actions taken by a foreign government against its own citizens.[2] We have jurisdiction under 28 U.S.C. § 1291, and affirm.

I

In August of 1977, Ferdinand Marcos was President of the Philippines, Marcos-Manotoc was the National Chairman of the Kabataang Baranggay, and Fabian Ver was in charge of military intelligence, Archimedes Trajano was a student at the Mapua Institute of Technology. On the 31st of August, Trajano went to an open forum discussion at which Marcos-Manotoc was speaking. When Trajano asked a question about her appointment as director of an organization, he was kidnapped, interrogated, and tortured to death by military intelligence personnel who were acting under Ver's direction, pursuant to martial law declared by Marcos, and under the authority of Ver, Marcos, and Marcos-Manotoc. He was tortured and murdered for his political beliefs and activities. Marcos-Manotoc controlled the police and military intelligence personnel who tortured and murdered Trajano, knew they

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[2] Marcos-Manotoc also argues that the action is time-barred by the two-year Hawaii statute of limitations, Haw. Rev. Stat. § 657-7, but this is an affirmative deefnse which was waived by virtue of her default. Because the statute of limitations is not jurisdictional, we do not consider this issue. *See United States v. DeTar*, 832 F.2d 1110, 1114 (9th Cir. 1987).

In her reply, Marcos-Manotoc claims that the district court did not have personal jurisdiction over her because she was not properly served. The district court found to the contrary. Because this issue was raised for the first time in her reply brief, Marcos-Manotoc has waived this issue as well. *See Nevada v. Watkins*, 914 F.2d 1545, 1560 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 1105 (1991).

were taking him to be tortured, and caused Trajano's death.

In February of 1986, Marcos, Marcos-Manotoc, General Ver and others left the Philippines and arrived at Hickam Air Force Base in Hawaii. On March 20, 1986, Agapita Trajano filed her complaint in the United States District Court for the District of Hawaii.[3] The complaint seeks damages on behalf of the estate of Archimedes Trajano for false imprisonment, kidnapping, wrongful death, and a deprivation of rights, and on behalf of Trajano's mother for emotional distress. Default was entered against Marcos-Manotoc on May 29, 1986. In 1991, she moved to set aside entry of default on the ground of insufficiency of service. The motion was denied and, after a damages hearing, judgment was entered based on the court's findings that Trajano was tortured and his death was caused by Marcos-Manotoc. The court concluded that this violation of fundamental human rights under 28 U.S.C. § 1350, and awarded damages of $4.6 million and attorneys' fees pursuant to Philippine law.[4]

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[3] Marcos moved to dismiss on act of state grounds, and the district court's order granting that motion was reversed on appeal in light of our intervening decision in *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1360-61 (9th Cir. 1988) (en banc) civil RICO action brought by the Philippines against Marcos not barred by act of state doctrine), *cert. denied*, 490 U.S. 1035 (1989). *See Trajano v. Marcos*, No. 86-2448 (9th Cir. July 10, 1989). The Judicial Panel on Multidistrict Litigation then consolidated two other actions against Marcos in the District of Hawaii and two actions in the Northern District of California, and assigned them to the Honorable Manuel L. Real, sitting pursuant to an intracircuit assignment under 28 U.S.C. § 292(b). The four actions consolidated with Trajano's are not before us at this time.

[4] The district court awarded the estate of Archimedes Trajano $236,000 for los earnings pursuant to Article 2206(1) of the Philippine Civil Code; $175,000 for moral damages including physical suffering, mental anguish, fright, bodily injury, and wrongful death pursuant to Articles 2217, 2204, and 2206 of the Philippine Civil Code; awarded Agapita Trajano $1,250,000 for mental anguish pur-

II

We must first determine whether Marcos-Manotoc is entitled to immunity under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602-11. The FSIA "must be applied by the district courts in every action against a foreign sovereign, since subject-matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983); *see also Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989); *Liu v. Republic of China*, 892 F.2d 1419, 1424 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 27 (1990). A "foreign state" under the Act includes "an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a).[5] We have, in turn, held that an "agency or instrumentality of a foreign state" for purposes of the FSIA includes individuals acting in their official capacity. *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1099-1103 (9th Cir. 1990). Therefore, because Marcos-Manotoc's default concedes that she controlled the military police, the FSIA is implicated and we must be satisfied that it does not

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suant to Article 2206(3) of the Philippine Civil Code; and awarded both Mrs. Trajano and the estate $2,500,000 in punitive damages pursuant to Articles 2229 and 2231 of the Philippine Civil Code, as well as $246,966.99 in costs and attorneys' fees pursuant to Article 2208(1), (5), (9) and (11) of the Code.

[5] 28 U.S.C. § 1603(b) defines an "agency or instrumentality of a foreign state" as any entity:

> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

bar jurisdiction, even though the issue was not raised in the district court.

Marcos-Manotoc argues that the FSIA is the sole basis for jurisdiction, preempting all other bases including § 1350. She relies on *Amerada Hess*, in which two Liberian corporations sued the Argentine Republic in a United States District Court for a tort allegedly committed by its armed forces on the high seas in violation of international law. The court of appeals had allowed the action to proceed under the Alien Tort Statute, but the Supreme Court held that it should be dismissed because the FSIA controls and does not authorized jurisdiction over a foreign state in these circumstances.[6] The Court made clear that the FSIA is the "sole basis for obtaining jurisdiction over a foreign state in our courts." 488 U.S. at 434; *see also Lui*, 892 F.2d at 1424. Thus, the FSIA trumps the Alien Tort Statute when a foreign state or, in this circuit, an individual acting in her official capacity, is sued.

Marcos-Manotoc argues that the Philippine Military Intelligence is an "instrumentality" of a foreign state within § 1603(b) of the FSIA, and that the tortious acts were brought about by persons acting pursuant to the authority of Marcos, Marcos-Manotoc, and Ver such that the liability of Marcos-Manotoc is expressly premised on her authority as a government agent. She further contends that, regardless of whether she acted within the scope of her employment, she is entitled to absolute immunity under § 1604[7] because a foreign state and its

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[6] The Court held that the most pertinent FSIA exception to sovereign immunity—that for noncommercial torts, § 1605(a)(5)—did not apply because it is limited to those cases in which the damage occurs in the United States. 488 U.S. at 439-40.

[7] 28 U.S.C. § 1604 provides:

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a

agents lose sovereign immunity only for tortious acts occurring in the United States. *See McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 588 (9th Cir. 1983) (Congress did not intend to assert jurisdiction over foreign states for events occurring wholly within their own territory), *cert. denied*, 469 U.S. 880 (1984). Trajano, on the other hand, argues that under *Chuidian*, the FSIA does not immunize acts of individuals which are outside the scope of their official duties,[8] and that the acts of torture and arbitrary killing (which the complaint avers occurred under Marcos-Manotoc's own authority) cannot be "official acts" within whatever authority Marcos-Manotoc was given by the Republic of the Philippines.

In *Chuidian*, we held that the FSIA covers a foreign official acting in an official capacity, but that an official is not entitled to immunity for acts which are not committed in an official capacity (such as selling personal property), and for acts beyond the scope of her authority (for example, doing something the sovereign has not empowered the official to do). 912 F.2d at 1106. In *McKeel*, in construing § 1605(a)(5) of the FSIA, which waives immunity for damages against a foreign state for injury occurring in the United States,[9] we found that Congress

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foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 and 1607 of this chapter.

[8] Amicus urges that the FSIA does not immunize individuals at all, *see Amerada Hess*, 488 U.S. at 438 (the Alien Tort Statute "of course has the same effect after the passage of the FSIA as before with respect to defendants other than foreign states"), but this argument is foreclosed by *Chuidian*.

[9] Section 1605(a)(5) provides:

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

. . . .

(5) not otherwise encompassed [in the commercial activity exception], in which money damages are sought against a foreign state for personal injury or death, or damage to or loss

intended the FSIA to be consistent with international law—and that the prevailing practice in international law is "that a state loses its sovereign immunity for tortious acts only where they occur in the territory of the forum state." 722 F.2d at 588.

Marcos-Manotoc's default makes the application of both cases easy in this case, for she had admitted acting on her own authority, not on the authority of the Republic of the Philippines.[10] Under these circumstances, her acts cannot have been taken within any official mandate and therefore cannot have been acts of an agent or instrumentality of a foreign state within the meaning of the FSIA. On any view, FSIA coverage under *Chuidian* is not triggered, and the statutory limitation to injury occurring in the United States recognized in *McKeel* is not relevant. As a matter of law, therefore, the district court did not err in failing to dismiss Marcos-Manotoc in her individual capacity."

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of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused . . . .

[10] This is consistent with our earlier decision that the same allegations against former President Marcos are not nonjusticiable "acts of state." *See Trajano v. Marcos*, No. 86-2448 (9th Cir. July 10, 1989). In so holding, we implicitly rejected the possibility that the acts set out in Trajano's complaint were public acts of the sovereign. Marcos-Manotoc presented no evidence to the contrary; indeed, her affidavit in support of the motion to lift entry of default declares that she was not a member of the government or the military at the time of Trajano's murder.

[11] The parties also disagree about whether the Philippine government's statement of non-objection to the litigation against former President Marcos amounts to a waiver of sovereign immunity for Marcos-Manotoc. Given our view that Marcos-Manotoc was not an official entitled to immunity, it is unnecessary to reach this issue.

III

Absent jurisdiction under the Foriegn Sovereign Immunities Act,[12] there is no dispute that the only possible jurisdictional basis for Trajano's action is the Alien Tort Statute, 28 U.S.C. § 1350. Section 1350 provides:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

It was enacted as part of the First Judiciary Act of 1789,[13] but has seldom been invoked. The debates that led to the Act's passage contain no reference to the Alien Tort Statutes, and there is no direct evidence of what the First Congress intended it to accomplish. The statute has, however, been comprehensively analyzed by the Second Circuit in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), which recognized a cause of action and subject-matter jurisdiction under § 1350 in an action between

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[12] 28 U.S.C. § 1330(a) provides:

> The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim or relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

Sections 1605-1607 set out the exceptions to immunity and the extent of liability. Because Marcos-Manotoc was not acting in an official capacity, she has no claim to sovereign immunity, no exceptions are applicable, and there can be no jurisdiction under § 1330(a).

[13] Judiciary Act of September 24, 1789, ch. 20, § 9, 1 Stat. 73, 76-77. The original statute read:

> [T]he district courts shall . . . have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.

Paraguayan citizens for acts of torture committed in Paraguay, and by the District of Columbia Circuit in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (Judges Edwards, Bork, and Robb writing separately), *cert. denied*, 470 U.S. 1003 (1985), which affirmed dismissal for lack of subject-matter jurisdiction of an action by Israeli citizens against the Palestine Liberation Organization for acts of terrorism in violation of international law.

We start with the face of the statute. It requires a claim by an alien, a tort, and a violation of international law. Trajano's complaint alleges that she and her son were citizens of the Philippines, and that her claims for relief arise under wrongful death statutes and various international declarations.[14]

There is no doubt, as the district court found, that causing Trajano's death was wrongful, and is a tort.[15] Nor, in view of Marcos-Manotoc's default, is there any dispute that Trajano's death was caused by torture. And, as we have recently held, "it would be unthinkable to conclude other than that acts of official torture violate

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[14] These include the United Nations Charter; the Universal Declaration of Human Rights, G. A. Res. 217A(III), 3 U.N. GAOR Supp. (No. 16), U.N. Doc. A/810 (1948); the American Convention on Human Rights, Nov. 22, 1969, 36 O.A.S.T.S. 1, O.A.S. Official Records OEA/Ser. 4 v/II 23, doc 21, rev. 2 (1975); the Declaration on the Protection of All Persons From Being Subjected to Torture, G. A. Res. 3452, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/1034 (1975); and the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51 at 197, U.N. Doc. A/RES/39/708 (1984), *reprinted in* 23 I.L.M. 1027 (1984).

[15] Marcos-Manotoc does not contend that the actions alleged do not give rise to tort liability for wrongful death both in the Philippines and in Hawaii. Because the case comes to us after entry of a default judgment, and she does not appeal the district court's award of damages pursuant to Philippine law, we have no call to decide issues pertaining to choice of law.

customary international law." *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992).

We believe, therefore, that Trajano's suit as an alien for the tort of wrongful death, committed by military intelligence officials through torture prohibited by the law of nations, is within the jurisdictional grant of § 1350.

Marcos-Manotoc argues, however, that the district court erred in assuming jurisdiction of a tort committed by a foreign state's agents against its nationals outside of the United States, and having no nexus to this country. If § 1350 were construed to confer jurisdiction under these circumstances, she asserts, it would exceed the constitutional limits on federal court jurisdiction under Article III of the Constitution. We disagree.

A

Marcos-Manotoc argues that there is no extraterritorial jurisdiction over civil actions based on torture. She urges that *Filartiga* has been undermined by intervening acts of the legislative and executive branches which indicate that the United States is not obliged to open its courts for the redress of torture occurring in another country. First, Marcos-Manotoc points to the fact that when the Senate ratified the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51 at 197, U.N. Doc. A/RES/39/708 (1984), *reprinted in* 23 I.L.M. 1027 (1984), it attached an understanding to Article 14 [16] that a state is required

[16] Article 14 of the 1984 Convention provides:

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.

2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

to provide a private right of action only for torture committed in territory under its jurisdiction.[17] From this she infers that it is inappropriate to rely on principles of international law to give victims of torture enforcement rights outside their own country. Nothing in the understanding, however, goes so far. Even if it could be read to reach transitory torts such as wrongful death, the understanding does not *prohibit* the United States from providing a forum for claims by aliens for torture occurring elsewhere.[18] The understanding, accordingly, sheds little light on the scope of § 1350.

The same is true of the fact that the Department of Justice has changed its position on whether a plaintiff such as Tranjano has a cause of action cognizable in federal court for a violation of international law condemning torture. Marcos-Mantoc notes that the government urged the court in *Filartiga* to read § 1350 expansively, while its amicus brief in this action supports a cause of action only for violations of international law rights which form a part of the law of the United States. Marcos-Manotoc suggests that the executive branch's withdrawal of support for *Filartiga* and the Senate's refusal to obligate federal courts to hear actions such as Trajano's demonstrate that the United States does not recognize a private right of action for torture having no nexus with the United States. We do not read the executive branch's flip on this issue as signifying so

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[17] The Senate's undersetanding under Article 14 reads:

> [I]t is the understanding of the United States that Article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State Party.

136 Cong. Rec. S17486 (daily ed. Oct. 27, 1990).

[18] *See, e.g.*, The Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (providing federal cause of action for redress of torture and extrajudicial killings, irrespective of nationality of parties or locus of activities).

much; its change of position in different cases and by different administrations is not a definitive statement by which we are bound on the limits of § 1350. Rather, we are constrained by what § 1350 shows on its face: no limitations as to the citizenship of the defendant, or the locus of the injury.

Nor do these acts by the Senate and the Department of Justice support Marcos-Manotoc's argument that general principles of international law may not provide a basis for federal court jurisdiction under § 1350. Regardless of the extent to which other principles may appropriately be relied upon, the prohibition against official torture "carries with it the force of a *jus cogens* norm," which " 'enjoy[s] the highest status within international law.' " *Siderman*, 965 F.2d at 715, 717 (quoting *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 940 (D.C. Cir. 1988)). As our survey of the scholarly and judicial opinion in *Siderman* reflects, there is widespread agreement on this; "all states believe [torture] is wrong, all that engage in torture deny it, and no state claims a sovereign right to torture its own citizens. Under international law, any state that engages in official torture violates *jus cogens*." *Id.* at 717 (citations omitted). We therefore conclude that the district court did not err in founding jurisdiction on a violation of the *jus cogens* norm prohibiting official torture.

Marcos-Manotoc finally argues that the district court's interpretation of § 1350 would open the floodgates to "foreign" cases in the federal courts. She also suggests that, contrary to the original purpose behind § 1350, to permit cases of this sort would invite, rather than avoid, controversy with foreign nations. We do not share these concerns in this case. As *Siderman* makes clear, the prohibition against official torture occupies a uniquely high status among norms of international law. The Philippine government has no objection to a United States

District Court's entertaining Trajano's claim, so there can be no unwarranted interference with its domestic affairs. The FSIA, with its limitation on tort recovery to injuries occurring in the United States, will apply in almost all other situations. And, because of Marcos-Manotoc's default, traditional brakes on access to the federal courts by those having insufficient nexus to the United States were not considered. Such limitations as venue and the doctrine of forum non conveniens are available in § 1350 cases as in any other. Finally, it goes without saying that personal jurisdiction must first be obtained; one hopes the universe of potential defendants is not that large.

For these reasons, subject-matter jurisdiction was not inappropriately exercised under § 1350 even though the actions of Marcos-Manotoc which caused a fellow citizen to be the victim of official torture and murder occurred outside of the United States.

B

Marcos-Manotoc argues that Article III of the United States Constitution does not support jurisdiction over purely foreign disputes such as Trajano's claim against her. Of the nine categories of federal power defined in Article III, only two arguably authorize jurisdiction in this case: the Foreign Diversity Clause,[19] which enables the federal courts to hear cases between a state, or its citizens, and a foreign country or its citizens, and the "Arising Under" Clause,[20] which extends the judicial

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[19] The Foreign Diversity Clause provides that the judicial power extends "to Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. Const. Art. III, § 2, cl. 1.

[20] "The judicial Power shall extend to all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." U.S. Const. Art. III, § 2, cl. 1

power to cases arising under the Constitution, laws of the United States, and treaties. It is clear that jurisdiction may not be predicated on the Foreign Diversity Clause, as a foreign plaintiff is neither "a State [n]or the Citizen[] thereof." Marcos-Manotoc contends that jurisdiction under the "Arising Under" Clause equally violates Article III because § 1350 is purely a jurisdictional statute and for "arising under" jurisdiction to exist, the rights of the parties must turn on the interpretation of federal substantive law. We agree that a jurisdictional statute may not alone confer jurisdiction on the federal courts, and that the rights of the parties must stand or fall on federal substantive law to pass constitutional muster. *Mesa v. California*, 489 U.S. 121, 136-37 (1989) (naked jurisdictional statutes "cannot independently support Art. III 'arising under' jurisdiction"); *Verlinden*, 461 U.S. at 495-97. We disagree that the rights of Trajano and Marcos-Manotoc do not depend on federal substantive law.

As we have already done, a federal court adjudicating a claim against a foreign state or official, *Chuidian*, 912 F.2d at 1103, must determine as a threshold matter whether the FSIA provides subject-matter jurisdiction. *Verlinden*, 461 U.S. at 493-94; *Siderman*, 965 F.2d at 706; *Liu*, 892 F.2d at 1424. In *Verlinden*, a foreign plaintiff sued an instrumentality of a foreign on a non-federal cause of action; subject-matter jurisdiction was predicated on the FSIA. The Court held that Congress, in passing the FSIA, did not "exceed[] the scope of Art. III of the Constitution by granting federal courts subject-matter jurisdiction over certain civil actions by foreign plaintiffs against foreign sovereigns where the rule of decision may be provided by state law." *Id.* at 491-97. Because federal courts must first determine whether foreign sovereigns or individual officials are immune before allowing suits against them to proceed, "a suit against a foreign state under [the FSIA] necessarily raises ques-

tions of substantive federal law at the very outset, and hence clearly 'arises under' federal law, as that term is used in Art. III." *Id.* at 493. The Court also emphasized that "[a]ctions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States, and the primacy of federal concerns is evident." *Id.*

For the same reasons, Congress did not lack power to confer subject-matter jurisdiction over this action. Only individuals who have acted under official authority or under color of such authority may violate international law, *Tel-Oren*, 726 F.2d at 791-95 (Edwards, J., concurring (rejecting notion that purely private actors have responsibilities under international law)), and proceeding against such individuals necessarily implicates sovereign immunity. Although Marcos-Manotoc's default concedes that she controlled the military intelligence personnel who tortured and murdered Trajano, and in turn that she was acting under color of the martial law declared by then-President Marcos, we have concluded that her actions were not those of the Republic of the Philippines for purposes of sovereign immunity under *Chuidian*.[21] Nevertheless, when questions of sovereign immunity under the FSIA are raised, as they have been here, *Verlinden controls*. Under *Verlinden*, subject-matter jurisdiction over this action satisfies Article III.

Marcos-Manotoc argues that the understanding attached by the Senate to Article 14 of the 1984 Convention—that the United States does not have to provide a forum for the redress of extraterritorial acts of torture—negates any constitutional underpinning for "arising under" jurisdiction because Congress has rejected application of federal court jurisdiction to such claims. This would, however, turn the point of Article III power upside down. It does not derive from the Senate, nor even the Congress;

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[21] See *supra* Part II.

rather, the Congress derives its capacity to confer jurisdiction from the Constitution.

The "Arising Under" Clause of Article III is construed differently, and more broadly, than the "arising under" requirement for federal question jurisdiction under 28 U.S.C. § 1331. *See Verlinden*, 461 U.S. at 495 ("Art. III 'arising under' jurisdiction is broader than federal-question jurisdiction under § 1331."); *id.* ("[T]he many limitations which have been placed on jurisdictions under § 1331 are not limitations on the constitutional power of Congress to confer jurisdiction on the federal courts.") (quoting *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 379 n.51 (1959)); *cf. Brannon v. Babcock & Wilcox Co. (In re TMI Litigation Cases Consolidated II)*, 940 F.2d 832, 861, 864-77 (3d Cir. 1991) (Scirica, J., concurring) (discussing differences between constitutional and statutory grants of "arising under" jurisdiction), *cert. denied*, 112 S. Ct. 1262 (1992). There is ample indication that the "Arising Under" Clause was meant to extend the judicial power of the federal courts, as James Madison put it, to "all cases which concern foreigners," Letter from James Madison to Edmund Randolph (April 8, 1787), *reprinted in* 9 The Papers of James Madison 368, 370 (R. Rutland & W. Rachal ed. 1975), and "all occasions of having disputes with foreign powers," 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 530 (J. Elliott ed. 1836) (remarks of J. Madison), and, as Alexander Hamilton wrote, to "all those [cases] in which [foreigners] are concerned . . . ." The Federalist No. 80, at 536 (A. Hamilton) (J. Cooke ed. 1961). It is also well settled that the law of nations is part of federal common law. *See The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."); *United States v. Smith*, 18 U.S. (5

Wheat.) 153, 160-61 (1820) (same). Thus, in addition to resolving the defendant's immunity, for a court to determine whether a plaintiff has a claim for a tort committed in violation of international law, it must decide whether there is an applicable norm of international law, whether it is recognized by the United States, what its status is, and whether it was violated in the particular case. We therefore hold that Congress had power through the "Arising Under" Clause of Article III of the Constitution to enact the Alien Tort Statute, and that exercising jurisdiction over Trajanos, claims against Marcos-Manotoc comports with Article III.

IV

At most, Marcos-Manotoc argues, the district court had jurisdiction under § 1350 to determine whether Trajano had a separate, substantive cause of action; none exists, she contends, because neither the treaties set out in the complaint nor the law of nations provides a private cause of action.[22] Thus, to the extent the court's decision relies upon either treaties or international law, Marcos-Manotoc submits it is erroneous.

The district court in fact agreed with Marcos-Manotoc that § 1350 is simply a jurisdictional statute and creates no cause of action itself. It proceeded to determine damages on default under Philippine law. From this we assume that the court did not rely on treaties or international law to provide the cause of action, only to establish federal jurisdiction. Indeed, the complaint alleges that Trajano's claims arise under wrongful death statutes, as well as international law. Since Marcos-Manotoc's appeal is only to the extent the district court founded Trajano's right to sue on treaties or the law of nations, it lacks merit because the tort is admitted. That it was

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[22] Because Congress passed the Torture Victim Protection Act, *supra* n.18, after the district court's decision, we have no occasion to consider its applicability to the present case.

committed in violation of international law supplies the jurisdictional key to federal court under § 1350. We cannot say the district court erred.

The district court's approach comports with the view that the First Congress enacted the predecessor to § 1350 to provide a federal forum for transitory torts (a tort action which follows the tortfeasor wherever he goes), *see Filartiga*, 630 F.2d at 885 (tracing transitory tort doctrine to 1774 decision of Lord Mansfield), whenever such actions implicate the foreign relations of the United States. *See Banco National de Cuba* v. *Sabbatino*, 376 U.S. 398, 427 n.25 (1964) (citing § 1350 as example of congressional intent to make claims implicating foreign affairs cognizable in federal courts); *Tel-Oren*, 726 F.2d at 790 (Edwards, J., concurring) ("As best we can tell, the aim of section 1350 was to place in federal court actions potentially implicating foreign affairs. The intent was not to provide a forum that otherwise would not exist . . . but to provide an *alternative* forum to state courts."). The district court's approach also allows the "law of nations" and "treaty" prongs of § 1350 to be treated consistently, in that the cause of action comes from municipal tort law and not from the law of nations or treaties of the United States. This avoids the anomalous result which troubled Judge Bork in *Tel-Oren*, that whereas *Filartiga* found a private right of action by implying it from principles of international law, no private cause of action can ever be implied from a nonself-executing treaty. *See Tel-Oren*, 726 F.2d at 820 (Bork, J., concurring).

For these reasons we affirm the judgment in Trajano's favor. Her suit as an alien against Marcos-Manotoc for having caused the wrongful death of her son, by official torture in violation of a *jus cogens* norm of international law, properly invokes the subject-matter jurisdiction of the federal courts under § 1350.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

MDL No. 840

IN RE: ESTATE OF FERDINAND E. MARCOS
HUMAN RIGHTS LITIGATION

Civil No. 86-0207

AGAPITA TRAJANO, *et al.*,
Plaintiffs,

v.

FERDINAND MARCOS, *et al.*

Heard: March 25, 1991 9:00 a.m.

Judge: MANUEL L. REAL

FINDINGS OF FACT; CONCLUSIONS OF LAW;
ORDER GRANTING DEFAULT JUDGMENT
AND RULE 54(b) CERTIFICATION

[Filed May 13, 1991]

This matter came on for hearing on March 25, 1991 at 9:00 a.m. before the Honorable Manuel L. Real of the above-entitled Court for a damages hearing on default judgment against Defendant Imee Marcos-Manotoc. Sherry P. Broder, Jon Van Dyke, and Lillian Ramirez-Uy appeared on behalf of the *Trajano* Plaintiffs. The Court examined the evidence presented and the memo-

randa and pleadings herein, photographs depicting the family, Archimedes Trajano, and injuries to Archimedes Trajano after his death; the expert testimony of pathologist, Dr. James Navin; the expert testimony of economist, Dr. James Barney Marsh; the testimony of Deputy Sheriff Dennis Nakata; the testimony of Agapita Trajano, mother of Archimedes Trajano, Polinar Trajano, brother of Archimedes Trajano, Marcita Trajano, sister of Archimedes Trajano; the Affidavits of Nenita Borja Paluyot, Eulogio R. Mallari, Eglesserio R. Suaberon, Jr., Catalino M. Magbanua, Oscar P. Mina, Garry B. Bautista, Benedicto E. Arenas, Gloria S. Ylagan, Wilma Manalo Catacutan, Richardo R. Porlete, and Nestor Nueva Ceniza; the Declaration of Patrick Norton; and makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. On August 31, 1977, Plaintiff Archimedes Trajano was a twenty-one (21) year old third-year engineering student at the Mapua Institute of Technology in the Republic of the Philippines.

2. On August 31, 1977, Plaintiff Archimedes Trajano attended an open-forum held at Mapua Institute of Technology where Defendant Imee Marcos-Manotoc was the guest speaker. The security guards of Defendant Imee Marcos-Manotoc apprehended Archimedes Trajano at said open-forum.

3. Plaintiff Archimedes Trajano was tortured and then executed. His body, found on September 2, 1977, showed lacerations, numerous cigarette burns, multiple bone fractures, and multiple skull fractures.

4. The cause of death was skull fracture of the right frontal skull which was depressed and probably lacerated the underlying brain.

5. Plaintiff Archimedes Trajano was tortured between 12 to 36 hours.

6. Plaintiff Archimedes Trajano sustained physical suffering, mental anguish, fright, bodily injury and wrongful death as a result of the torture, death and execution caused by Defendant Imee Marcos-Manotoc.

7. Plaintiff Archimedes Trajano suffered lost present, past and future earnings totaling two hundred thirty six thousand United States dollars ($236,000) as a result of his death and execution caused by Defendant Imee Marcos-Manotoc.

8. Plaintiff Agapita Trajano suffered mental anguish by reason of the torture, death and execution of Archimedes Trajano caused by Defendant Imee Marcos-Manotoc.

CONCLUSIONS OF LAW

1. The torture, death and execution of Archimedes Trajano was caused by Defendant Imee Marcos-Manotoc. This gross violation of fundamental human rights constitutes a tort in violation of the laws of nations.

2. The Estate of Archimedes Trajano is entitled to an award of two hundred thirty six thousand United States dollars ($236,000) for past, present, and future lost earnings of Archimedes Trajano, pursuant to Article 2206(1) of the Philippine Civil Code.

3. The Estate of Archimedes Trajano is entitled to an award of one hundred seventy five thousand United States dollars ($175,000) for moral damages including physical suffering, mental anguish, fright, bodily injury, and wrongful death and execution of Archimedes Trajano, pursuant to Article 2217, 2204, and 2206 of the Philippine Civil Code.

4. Plaintiff Agapita Trajano is entitled to an award of one million two hundred fifty thousand United States dollars ($1,250,000) for the mental anguish she suffered by reason of the death of Archimedes Trajano, pursuant to Article 2206(3) of the Philippine Civil Code.

5. The wrongful acts of Defendant Imee Marcos-Manotoc justifies an award of exemplary damages to the Estate of Archimedes Trajona and the Plaintiff Agapita Trajano to be shared equally in the sum of two million five hundred thousand United States dollars ($2,500,000), pursuant to Article 2229 and 2231 of the Philippne Civil Code, by way of example or correction for the public good.

6. Plaintiffs are entitled to an award of attorneys' fees and expenses of litigation pursuant to Article 2208(1), (5) (9) and (11) of the Philippine Civil Code.

7. Pursuant to Federal Rule of Civil Procedure 54 (b), this Court expressly determines that there is no just reason for delay.

ORDER GRANTING DEFAULT JUDGMENT AND RULE 54 (b) CERTIFICATION

Based on the foregoing Findings of Fact and Conclusions of Law, the Court now makes the following decree:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. The Estate of Archimedes Trajano is awarded the sum of two-hundred thirty six thousand United States dollars ($236,000) for lost earnings;

2. The Estate of Archimedes Trajano is awarded the sum of one hundred seventy five thousand United States dollars ($175,000) for the physical suffering, mental anguish, fright, bodily injury, and wrongful death of Archimedes Trajano;

3. Plaintiff Agapita Trajano, individually, is awarded the sum of one million two hundred fifty thousand United States dollars ($1,250,000) for mental anguish by reason of the death of Archimedes Trajano;

4. Plaintiff Estate of Archimedes Trajano is awarded two million five hundred thousand United States dollars ($2,500,000) for punitive damages;

5. Plaintiffs be awarded attorneys' fees and costs incurred in the prosecution of this judgment in the amount of $232,344.49 for attorneys' fees with Hawaii State and , and $14,622.50, for costs of litigation, to be shared equally between Plaintiff Agapita Trajano and Plaintiff Estate of Archimedes Trajano.

6. Pursuant to Federal Rule of Civil Procedure 54 (b), this Corut expressly determines that there is not just reason for delay and therefore directs the Clerk of the Court to enter this final Judgment forthwith.

DATED: at Honolulu, Hawaii, May 13, 1991.

/s/ The Honorable Manuel L. Real
THE HONORABLE MANUEL L. REAL
United States District Judge

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

MDL No. 840

IN RE: ESTATE OF FERDINAND E. MARCOS
HUMAN RIGHTS LITIGATION

Civil No. 86-0207

AGAPITA TRAJANO, *et al.*,
Plaintiffs,

v.

FERDINAND MARCOS, *et al.*

ORDER GRANTING APPLICATION FOR APPROVAL OF ATTORNEYS' FEES AND COSTS

[Filed May 13, 1991]

The Court having considered the Application For Approval of Attorneys' Fees and Costs and good cause appearing therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said Application is granted and Plaintiffs are entitled to attorneys' fees in the amount of $232,344.49, including general excise tax, and costs in the amount of $14,622.50 for a total of $246,966.99.

DATED at Honolulu, Hawaii, this 13th day of May, 1991.

/s/ The Honorable Manuel L. Real
THE HONORABLE MANUEL L. REAL
United States District Judge

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

MDL No. 840

IN RE: ESTATE OF FERDINAND E. MARCOS
HUMAN RIGHTS LITIGATION

Civil No. 86-0207

AGAPITA TRAJANO, *et al.*,
Plaintiffs,

v.

FERDINAND MARCOS, *et al.*

Heard: March 25, 1991 9:00 a.m.

Judge: MANUEL L. REAL

JUDGMENT

[Filed May 13, 1991]

This action came on for hearing on March 25, 1991, before the Honorable Manuel L. Real, District Judge, presiding, on the application of Plaintiffs Agapita Trajano and the Estate of Archimedes Trajano (collectively, "Plaintiffs"), for a default judgment against Defendant Imee Marcos-Mantoc pursuant to Federal Rule of Civil Procedure 55(b)(2).

IT IS HEREBY ORDERED ADJUDGED AND DECREED that Plaintiffs Agapita Trajano, individually,

and the Estate of Archmides Trajano recover of Defendent Imee Marcos-Manotoc their attorneys' fees and expenses of litigation plus the following sums, with interest thereon to the extent provided by law:

To Plaintiff Estate of Archimedes Trajano for lost earnings: $236,000;

To Plaintiff Estate of Archimedes Trajano, for the physical suffering, mental anguish, fright, bodily injury and wrongful death of the Decedent Archimedes Trajano: $175,000;

To Plaintiff Agapita Trajano, individually, for loss of comfort, society and support, and mental anguish: $1,250,000

To Plaintiff Estate of Archimedes Trajano and Plaintiff Agapita Trajano together, to be shared equally, for punitive damages: $2,500,000;

To both Plaintiffs Estate of Archimedes Trajano and Plaintiff Agapita Trajano together, to be shared equally, attorneys' fees and expenses of litigation required for prosecution of this judgment: $246,966.99.

Pursuant to Federal Rule of Civil Procedure 54(b), this Court expressly determines that there is no just reason for delay and therefore directs the Clerk of the Court to enter this final Judgment forthwith.

DATED at Honolulu, Hawaii, this 13th day of May, 1991.

/s/ The Honorable Manuel L. Real
THE HONORABLE MANUEL L. REAL
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE: ESTATE OF FERDINAND E. MARCOS
HUMAN RIGHTS LITIGATION

No. 91-15891

D.C. No. CV-86-207-MLR

AGAPITA TRAJANO; ARCHIMEDES TRAJANO,
Plaintiffs-Appellees,

v.

FERDINAND E. MARCOS,
Defendant,
and

IMEE MARCOS-MANOTOC,
Defendant-Appellant.

ORDER

[Filed December 29, 1992]

Before: BROWNING, PREGERSON and RYMER, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for a rehearing en banc is REJECTED.

APPENDIX D

UNITED STATES DISTRICT COURT
STATE OF HAWAII

AGAPITA TRAJANO, on behalf of the Estate of
ARCHIMEDES TRAJANO, and
AGAPITA TRAJANO, individually,
Plaintiff,

vs.

FERDINAND MARCOS, IMEE MARCOS, aka
IMEE MARCOS-MANOTOC, FABIAN VER,
Defendants.

COMPLAINT

[Filed Mar. 20, 1986]

I. *JURISDICTION*

1. This action is brought pursuant to 28 U.S.C. 1331 and 1332 28 U.S.C. 1350 which establishes original district court jurisdiction over "all causes where an alien sues for a tort only [committed] in violation of the law of nations."

2. From on or about August 31, 1977 to September 2, 1977, ARCHIMEDES TRAJANO was kidnapped and subsequently tortured to death by Defendants, by and through their agents and employees. ARCHIMEDES TRAJANO was tortured and murdered for his political beliefs and activities.

II. *PARTIES*

3. Plaintiff AGAPITA TRAJANO brings this action in her individual capacity and as the mother of decedent. Plaintiff AGAPITA TRAJANO intends to petition to be appointed as Executor of the Estate of ARCHIMEDES TRAJANO according to the laws of the Philippines. Plaintiff ARCHIMEDES TRAJANO is the decedent herein and at all times relevant herein was a citizen of the Philippines.

4. Plaintiff AGAPITA TRAJANO is a resident of the City and County of Honolulu.

5. At all times relevant herein, Defendant FERDINAND MARCOS was the President of the Philippines and a resident of the Philippines. Defendant MARCOS is currently residing in the City and County of Honolulu and does not hold a valid passport.

6. At all times relevant herein, Defendant IMEE MARCOS, also known as IMEE MARCOS-MANOTOC, was the NATIONAL CHAIRMAN OF THE KABATAANG BARANGGAY and a resident of the Philippines.

7. Defendant IMEE MARCOS is now residing and in the City and County of Honolulu and does not hold a valid passport.

At all times relevant herein, Defendant FABIAN VER was the military officer in charge of the military intelligence personnel and resided in the Philippines. Defendant VER is now residing in the City and County of Hononlulu and does not hold a valid passport.

III. *FACTS*

8. On or about August 31. 1977, ARCHIMEDES TRAJANO was a student at Mapua Institute of Technology and was attending an open forum discussion at which Defendant IMEE MARCOS was the speaker.

9. ARCHIMEDES TRAJANO posed a question to AIMEE MARCOS relating to her appointment as Director of an organization. At the time decedent asked the above-described question, he was kidnapped and forcibly removed against his will from the open forum by military intelligence personnel and forcibly taken for incommunicado interrogation.

10. Plaintiff alleges on information and belief that on or about September 1, 1977, decedent was forced against his will to appear at the home of a relative in Manila, The Philippines. Plaintiff further alleges on information and belief that decedent had been tortured and subjected to other forms of ill-treatment by military intelligence personnel at the time he appeared at said home.

11. Plaintiff further alleges on information and belief that on or about September 1, 1977, decedent was forced to return against his will to his boarding house. The night of September 1, 1977, military intelligence personnel physically tortured decedent, broke his bones, cracked his skull, and murdered decedent with malice. Decedent was tortured and killed in retaliation for his political beliefs and activities. Plaintiff ARCHIMEDES was one of the victims of the systematic murder of political opponents of martial law. As Father Walter Hogan, a Jesuit, wrote, "There is a rather long list of people who are known to have been arrested by the military and who made their next appearance as dead bodies." *See Pumipiglas, Political Detention and Military Atrocities in the Philippines*, Task Force on Detainees, Philippines, published by the Association of Major Religious Superiors in The Philippines, 1980.)

12. At all times relevant herein, Defendant FERDINAND MARCOS declared martial law in the Philippines and pursuant to said "law" all acts of the police and military were carried out pursuant to his own orders. De-

fendant MARCOS was the senior official with ultimate responsibility for the administration of prisoners detained or arrested under martial law. At all times relevant herein, Defendant FABIAN VER was the chief military officer in charge of the various branches of the Philippines military intelligence and all acts of the police and military intelligence were carried out pursuant to his order. Defendant IMEE MARCOS-MANOTOC knew or should have known that ARCHIMEDES TRAJANO was taken by military intelligence personnel for purposes of torture and salvage.

13. On or about September 2, 1977, the police showed Plaintiff the body of her son, which evidenced marks of severe torture, beatings, and brutality.

IV. *CLAIMS FOR RELIEF*

14. The above-described death of decedent was proximately caused by the acts of Defendants. Plaintiffs' claims arise under wrongful death statutes, The United Nations Charter, the Universal Declaration of Human Rights, General Assembly Resolution 217 (III)(A) (December 10, 1948), the U.N. Declaration Against Torture, The American Declaration of the Rights and Duties of Man, U.N. General Assembly Resolution 2625 (XXV) (October 24, 1970), Declaration on the Protection of All Persons From Being Subjected to Torture, General Assembly Resolution 3452, 30 U.N. GAOR Supp. (No. 34) 91, U.N. Doc. A/1034 (1975), which states that:

> "The Declaration goes on to provide that "[w]here it is proved that an act of torture or other cruel, inhuman or degrading treatment or punishment has been committed by or at the instigation of a public official, the victim shall be afforded redress and compensation, in accordance with national law."

On December 9, 1975, the Philippines government voted in favor of United Nations General Assembly Resolution

3542. At all times relevant herein, the Defendants, and each of them intentionally, recklessly, willfully, wantonly, negligently and carelessly investigated, reported, regulated, supervised, trained, controlled, and hired the police and military intelligence personnel.

15. The above-described detention of decedent constituted false imprisonment, kidnapping and a deprivation of his rights. At the time of his death, decedent was 17 years old. Decedent was a kind, affectionate, and devoted son and brother, constantly interested in the welfare of his mother. He was a third year engineering student, and in excellent physical health, and had promised to devote his earnings to the care, support, and maintenance of his mother.

16. Because of the untimely and brutal death of decedent, Plaintiff AGAPITA TRAJANO has been damaged by loss of the support and maintenance from decedent's future earnings, by the loss of his care, council, and advice, and by funeral expenses incurred.

17. Defendants' conduct was a willful, malicious act justifying the imposition of punitive damages.

18. The above occurrences of August 31, 1977 to September 2, 1977, were brought about by the conduct of Defendants and their agents and representatives acting pursuant to the authority of Defendants.

19. On or about August 31, 1977 to September 2, 1977, decedent was physically beaten, tortured, and drugged before his death and suffered great conscious physical pain and mental anguish and suffering before his death.

20. On or about September 2, 1977 to the present, Plaintiff AGAPITA TRAJANO has suffered great mental anguish and suffering from seeing the tortured and mutilated body of her son and from his untimely, premature death.

WHEREFORE Plaintiffs demand judgment against said Defendants as follows:

1. General and special damages to be proved at trial;

2. Damages for mental and emotional distress in an amount to be proven at trial;

3. Punitive damages in an amount to be proven at trial;

4. Attorney's fees, costs and interest from the date of wrong as allowed by law; and,

5. Such other and further relief as the Court deems just and proper.

DATED: Honolulu, Hawaii March 20, 1986.

/s/ Sherry P. Broder
SHERRY P. BRODER

UNITED STATES DISTRICT COURT
STATE OF HAWAII

Civil No. ———

AGAPITA TRAJANO, on behalf of the Estate of
ARCHIMEDES TRAJANO, and
AGAPITA TRAJANO, individually,
Plaintiff,

vs.

FERDINAND MARCOS, IMEE MARCOS, aka
IMEE MARCOS-MANOTOC, FABIAN VER,
Defendants.

SUMMONS

STATE OF HAWAII

To the above-named Defendants:

You are hereby summoned and required to serve upon SHERRY P. BRODER, attorney for Plaintiffs, whose address is 345 Queen Street, Suite 800, Honolulu, Hawaii 96813, an answer to the Complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

DATED: Honolulu, Hawaii Mar. 20, 1986.

/s/ George A. Bartels, Jr.
GEORGE A. BARTELS, JR.
Deputy Clerk
United States District Court
District of Hawaii

Supreme Court, U.S.
FILED
MAY 19 1993
OFFICE OF THE CLERK

No. 92-1559

In The

Supreme Court of the United States

October Term, 1992

IMEE MARCOS-MANOTOC,

Petitioner,

v.

AGAPITA TRAJANO,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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1988

QUESTION PRESENTED

Should this Court grant review to decide potentially far-reaching questions of constitutional law in a case in which the Petitioner defaulted on the merits and in a situation where Congress has recently passed a statute that almost entirely eliminates any future significance of a decision by this Court?

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No. 92-1559

In The

Supreme Court of the United States

October Term, 1992

IMEE MARCOS-MANOTOC,

Petitioner,

v.

AGAPITA TRAJANO,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

In August 1977, Archimedes Trajano, a college student, was tortured for 36 hours and then summarily executed by personnel who were acting under the authority of Petitioner. This event led to the decision of his mother, the Respondent Agapita Trajano, to leave the Republic of the Philippines to start a new life in Hawaii, where she has lived since 1982. In 1986, Respondent filed this suit against Petitioner and others in the U.S. District Court for the District of Hawaii.

Petitioner – who had come with other members of her family to Hawaii and was then staying with them – was properly served in Hawaii, but she failed to answer the Complaint filed against her, and later fled the jurisdiction. The district court subsequently assessed damages, entered judgment against Petitioner, and certified the judgment as final pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

Petitioner now lives outside the United States. She has not submitted to a deposition in aid of execution, and she has failed to satisfy the judgment or post a supersedeas bond while appealing to the U.S. Court of Appeals for the Ninth Circuit and now to this Court.

Petitioner has not challenged the court's personal jurisdiction over her in any of her appeals. Moreover, because of her failure to answer the Complaint, Petitioner has waived all defenses except those regarding the subject-matter jurisdiction of the court, and all of the facts necessary to establish liability and the jurisdiction of the district court are deemed admitted. Petitioner is seeking to use the present Petition to reopen issues that are foreclosed because of the default judgment.[1]

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[1] This Petition is the fifth Petition or Application that has been filed by a member of the Marcos family to this Court during the past seven years. *Araneta et ux. v. United States*, 479 U.S. 924 (1988) (brought by the Petitioner's sister and her husband); *Ferdinand Marcos et ux. v. United States*, 484 U.S. 890 (1987); *Ferdinand and Imelda Marcos v. United States*, 488 U.S. 952 (1988); *Ferdinand and Imelda Marcos v. Republic of the Philippines*, 490 U.S. 1035 (1989).

REASONS FOR DENYING THE WRIT

The issues raised by Petitioner are not appropriate for review. The unanimous decision of the U.S. Court of Appeals for the Ninth Circuit, written by Circuit Judge Pamela Rymer, is not in conflict with any decision of this or any other court. In addition, this case is unique because it involves a default judgment. Finally, because Congress recently passed the Torture Victim Protection Act (TVPA), described below, which would clearly authorize actions of the kind at issue here, resolution of the issues presented would have little or no future applicability.

1. No federal court that has addressed the issues identified by Petitioner has reached a result inconsistent with any of the holdings of the U.S. Court of Appeals for the Ninth Circuit in the present case. *See Filartiga v. Pena-Irala*, 630 F. 2d 876 (2d Cir. 1980); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C.Cir. 1984) (Edwards, J., concurring); *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987) and 694 F. Supp. 707 (N.D.Cal. 1988); and *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. 246 (D.D.C. 1985), *reversed on other grounds*, 736 F. Supp. 1 (D.D.C. 1990). *See also Linder v. Portocarrero*, 963 F.2d 332 (11th Cir. 1992) (recognizing a federal cause of action under diversity jurisdiction for acts of tortūre and summary execution). Moreover, the overwhelming majority of commentators on the subject have supported the result reached in these decisions.[2] Indeed, Petitioner makes no

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[2] *See* articles cited in David Cole, Jules Lobel & Harold Hogju Koh, *Interpreting the Alien Tort Statute: Amicus Curiae Memorandum of International Law Scholars and Practitioners in*

claim of inter-circuit conflict; she simply argues that the decision below is in error.

2. This civil lawsuit satisfies all the usual procedural requirements required by a civil claim, and does not present any important recurring issues. Petitioner was properly served in this case and does not raise any issues regarding personal jurisdiction. She was living in Hawaii with her family when she was served in 1986, she remained in the United States for the next several months before fleeing the country, and she had ample other ties with Hawaii and the rest of the United States to establish personal jurisdiction. The Respondent has lived in Hawaii since 1982. This case does not, therefore, present a case of "forum shopping," or present any other basis for this Court's review. And, as the Ninth Circuit noted in an earlier opinion in this case, "[n]either the present government of the Republic of the Philippines nor the United States government objects to judicial resolution of these claims, or sees any resulting potential embarrassment to any government." *Trajano v. Marcos*, C.A. Nos. 86-2448, 86-15039, Memorandum Opinion (9th Cir. July 10, 1989).

The Court of Appeals correctly characterized Respondent's claim as a "transitory tort . . . which follows the tortfeasor wherever he goes," and which can be brought in U.S. federal courts when personal jurisdiction is obtained and the tort violates international law. Pet. App. 19a. The Ninth Circuit had previously surveyed international law and had concluded that "it would be

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Trajano v. Marcos, 20 Hastings Int'l & Comp. L. Rev. 1, 23 n.78 (1988).

unthinkable to conclude other than that acts of official torture violate customary international law." *Siderman de Blake v. Republic of Argentina*, 965 F. 2d 699, 717 (9th Cir. 1992). In fact, that opinion found that "the prohibition against official torture occupies a uniquely high status among norms of international law" and constitutes a violation of a "*jus cogens* norm." Pet. App. 13a (citing *Siderman, supra*, 965 F.2d at 717).

Moreover, because this case involves a default judgment, many issues that would normally be raised by this type of claim are not present in this case. Among the issues not raised in the present case that would be involved in a "typical" case of this sort are the issues of *forum non conveniens*, the sovereign immunity that might attach to a government official, what conduct is unprotected by that immunity because it is outside the "outer perimeter" of governmental conduct, whether such sovereign immunity has been waived by the current government, who has the burden of proving an immunity claim, what statute of limitations should apply and whether it should be tolled, and how the choice-of-law principles should be applied to each of these issues. Because of the default, none of these issues is before the Court.

3. Congress's recent enactment of the Torture Victim Protection Act (TVPA), Pub. L. 102-256, 106 Stat. 73, 28 U.S.C. sec. 1350 note (1993 Supp.), dramatically reduces the future significance of the issues raised by Petitioner. On March 12, 1992, President Bush signed the TVPA into law, and it will almost certainly govern future cases of this kind. Congress explicitly reaffirmed in the TVPA that the federal courts of the United States should be open to

the claims of victims of torture who have suffered at the hands of foreign government officials, if they can obtain personal jurisdiction over these officials. This statute is not identical to the Alien Tort Claims Act, 28 U.S.C. sec. 1350 invoked in the present case, but the two statutes intersect. It is, therefore, probable that most torture victims in the future will invoke the Torture Victim Protection Act, along with the Alien Tort Claims Act, as well as federal question jurisdiction under 28 U.S.C. sec. 1331 and diversity jurisdiction under 28 U.S.C. sec. 1332, when they are applicable. Accordingly, the issues raised by Petitioner regarding the Alien Tort Claims Act are likely to have extremely limited applicability to future cases.

The legislative history of the TVPA clearly explains its design and purpose – to ensure that U.S. courts would remain open to victims of torture and extrajudicial killings committed under color of law outside the United States. The reports of the Judiciary Committees of the Senate and House (*The Torture Victim Protection Act of 1991: Report No. 102-249 of the Senate Judiciary Committee,* 102d Cong., 1st Sess. (Nov. 26, 1991), and *Torture Victim Protection Act of 1991: Report No. 102-367 of the House Judiciary Committee,* 102d Cong., 1st Sess. (Nov. 25, 1991)) contain essentially identical language providing the background and purpose of this statute. They explain that the TVPA was designed to reconfirm Congress's recognition of the existence of a private right of action for victims of torture and extrajudicial killings. In explaining why the TVPA was needed when the Alien Tort Claims Act was already in place, these two reports state that the TVPA builds on the Alien Tort Claims Act "in an important

respect: while the Alien Tort Claims Act provides a remedy to aliens only, the TVPA would extend a civil remedy also to U.S. citizens who may have been tortured abroad." Senate Rpt. No. 102-249 at 5; House Rpt. No. 102-367 at 4.[3] The passage of the TVPA also confirms the commitment of the United States to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51 at 197, U.N. Doc. A/RES/39/708 (1984), *reprinted in* 23 I.L.M. 1027 (1984), which the United States ratified in 1990.

Congress's power to enact the TVPA and the Alien Tort Claims Act has been clearly established by the precedents of this Honorable Court. *See, e.g., Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 481 (1983) (the "arising under" clause of Article III authorizes Congress to confer jurisdiction on U.S. courts to recognize claims brought by a foreign plaintiff against a foreign defendant); *Ex Parte Quirin,* 317 U.S. 1, 28 (1942) (Article I, Section 8, Clause 10 authorizes Congress "to define and punish . . . Offenses against the Law of Nations); *The Paquete Habana,* 175 U.S. 677, 700 (1900) (the law of the United States includes international law).

4. Petitioner argues strenuously that the decision of the Ninth Circuit is inconsistent with *Argentine Republic v.*

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[3] Because of the enactment of the TVPA, "it is too late in the day" to argue that Congress had intended some different result when it enacted the Alien Tort Claims Act back in 1790. *See Franklin v. Gwinnett County Public Schools,* 112 S.Ct. 1028, 1039, 117 L.Ed. 2d 208, 225 (1992) (Scalia, J., concurring, joined by Rehnquist, C.J., and Thomas, J.).

Amerada Hess Shipping Corporation, 488 U.S. 428 (1989). The fundamental difference between the present case and *Amerada Hess* (and between the present case and *Saudi Arabia v. Nelson*, 61 U.S.L.W. 4253 (U.S., March 23, 1993)) is that in the present case an individual is the defendant, while in *Amerada Hess* and *Nelson* a foreign government was named as defendant. As the Ninth Circuit correctly noted, because Petitioner defaulted in this case, she is deemed to have acknowledged that she was not acting as a sovereign, and hence is not entitled to any claim of sovereign immunity. *See* Pet. App. 8a. Moreover, in the only document Petitioner sought to introduce into evidence in the present case, she asserted "that she was not a member of the government or the military at the time of Trajano's murder." Pet. App. 8a n.10. *See also* H.R. Rep. No. 1487, 94th Cong., 2d Sess. 17, reprinted in 1976 U.S. Cong. Code & Admin. News 6604, 6616 (under the Foreign Sovereign Immunities Act, immunity would remain an "affirmative defense which must be specially pleaded, the burden [remaining] on the foreign state to produce evidence in support of its claim"); *Olsen by Sheldon v. Government of Mexico*, 729 F.2d 641 (9th Cir.), *cert. denied*, 469 U.S. 917 (1984) (a foreign state has the ultimate burden of proving its claim of immunity under the FSIA); *Forsythe v. Saudi Arabian Airlines Corp*, 885 F.2d 285 (5th Cir. 1989) (accord); *Transamerica S.S. Corp. v. Somali Democratic Republic*, 767 F.2d 998 (D.C. Cir. 1985) (accord).

It is also important to note that the *Amerada Hess* decision did not alter or in any way undercut the force of the Alien Tort Claims Act, which provides jurisdiction in the present case. As this Court stated in *Amerada Hess*:

> The Alien Tort Statute by its terms does not distinguish among classes of defendants, and it of course has the same effect after the passage of the FSIA as before with respect to defendants other than foreign states.

488 U.S. at 439.

5. Petitioner points out that the district court examined Philippine law when assessing damages against her and thereby attempts to show that the basis of the decision against her was not international law forbidding torture, but the domestic law of the Philippines. It is, however, not only logical but also appropriate and necessary for a court that is drawing upon international law principles to look to the rules applicable in domestic legal systems to fill in some of the details required by a claim. The precepts of international law authorize decision-makers to look to "general principles of law" – principles that are common to all the relevant domestic legal systems – to fill in the interstices of law that may not be explicitly codified in the international legal system. *See* Statute of the International Court of Justice, article 38(c), 59 Stat. 1031, T.S. No. 993; Ian Brownlie, *Principles of Public International Law* 16 (4th ed. 1990). This process is similar to the actions of federal judges who look to state law to fill in the details that sometimes are missing from federal statutes. In the present case, the district judge looked to the Civil Code of the Philippines, where the violation of international law took place, for guidance regarding the types of damages that should be awarded. This source was appropriate, particularly since it was consistent with the approach used in many other legal systems, including our own.

CONCLUSION

For the foregoing reasons, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 19, 1993

STATUTORY ADDENDUM

ALIEN TORT CLAIMS ACT – 28 U.S.C. § 1350

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

TORTURE VICTIM PROTECTION ACT, P.L. 102-256, 106 Stat. 73

An Act to carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Torture Victim Protection Act of 1991".

SEC. 2. ESTABLISHMENT OF CIVIL ACTION.

(a) LIABILITY. – An individual who, under actual or apparent authority, or color of law, of any foreign nation –

(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

(b) EXHAUSTION OF REMEDIES. – A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

(c) STATUTE OF LIMITATIONS. – No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

SEC. 3. DEFINITIONS.

(a) EXTRAJUDICIAL KILLING. – For the purpose of this Act, the term "extrajudicial killing" means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

(b) TORTURE. – For the purpose of this Act –

(1) the term "torture" means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third

person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and

(2) mental pain or suffering refers to prolonged mental harm caused by or resulting from –

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another individual will imminently by subjected to death; severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

Approved March 12, 1992.

SUPREME COURT, U.S.
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No. 92-1559

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

IMEE MARCOS-MANOTOC,
Petitioner,
v.
AGAPITA TRAJANO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

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IMEE MARCOS-MANOTOC,

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

I. RESPONDENT'S DECLINATION TO DEFEND THE JUDGMENT BELOW DEMONSTRATES THE NEED FOR REVIEW.

Petitioner demonstrated (pet. pp. 10-12) that the holding of the court below that the Alien Tort Statute, 28 U.S.C. § 1350, is a grant of *worldwide* jurisdiction to the district courts is in irreconcilable conflict with the repeated declarations of this Court that Acts of Congress "apply only within the territorial jurisdiction of the United States unless Congress clearly states otherwise." *Smith v. United States*, No. 91-1538, —— U.S. ——, —— (1993), *quoting, Equal Employment Opportunity Commission v. Arabian American Oil Co.*, 499 U.S. ——, —— (1991). Respondent silently concedes this to be true and does not even attempt to defend the holding of the court of appeals on this issue.

Petitioner also demonstrated (pet., pp. 8-10) that the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1361 et seq., is applicable to Mrs. Manotoc in her official capacity as a person controlling the operation of the Military Intelligence Service of the Republic of the Philippines and that the decision below assuming jurisdiction under the Alien Tort Statute without regard to FSIA is in irreconcilable conflict with the unambiguous holding of the Court in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989). Respondent offers no serious contrary argument. There is none.

II. RECENT LEGISLATION HIGHLIGHTS THE NEED FOR REVIEW OF THE JUDGMENT BELOW.

Unable to defend the decision below, respondent attempts to minimize its importance. Respondent suggests (Resp. pp. 5-7) that the recent enactment by Congress of the Torture Victim Protection Act, Pub. L. 102-256, 106 Stat. 73 ("TVPA"), lessens the need for review of the unprecedented decision of the court of appeals. Precisely the reverse is true. Review of the judgment below is required not only to vindicate the authority of this Court but to prevent a panel of one court of appeals from frustrating the expressed intent of Congress that United States courts *not* assume jurisdiction in cases brought by alien plaintiffs alleging mistreatment at the hands of officials of their own governments unless such plaintiffs have first exhausted available remedies in "the place in which the conduct giving rise to the claim occurred." 106 Stat. 73, 74.

As petitioner demonstrated, it was only after the committees of Congress in which TVPA had languished for many years added this provision to the bill that a majority of either House was willing to enact it.

The decision below ignores this recent expression of congressional purpose. The effect of the decision below

is the same as if the court of appeals had simply ordered that section 2(b) of TVPA be repealed.

CONCLUSION

The conflict between the decision of the court of appeals and the controlling decisions of this Court is, of itself, sufficient reason for review. When there is added the conflict between the decision below and the statute Congress recently enacted the need for review becomes, we submit, clear beyond argument. For the foregoing reasons, and the reasons stated in the petition, certiorari should be granted.

Respectfully submitted,

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